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No. 05-1419

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IN THE

Supreme Court of the United States

STEVEN T. WAUGH,

Petitioner,

v.

THOMAS A. HORTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent acknowledges that the courts of appeals have adopted "differing interpretations" of whether a violation of the forum defendant rule of 28 U.S.C. § 1441(b) is a jurisdictional defect requiring remand or instead a nonjurisdictional defect that must be raised by motion within 30 days of removal. Br. in Opp. 26. The Eighth Circuit holds that the rule is jurisdictional, while six other circuits have held that it is not, and a seventh has so stated in dicta.

The split among the circuits is squarely presented in this case; the majority position is well established and the Eighth Circuit has declined to reconsider its contrary holding. This case provides an appropriate vehicle for resolving the split: There is complete diversity here because even if Respondent is properly considered a trustee in this case (which he is not), a trustee's own citizenship is counted for diversity purposes, not that of the trustors or the beneficiaries. *See Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 (1980). There is no dispute that Respondent is a citizen of Maine and no defendant is a citizen of that State.

I. The Circuits Are Squarely Split Over Whether A Violation Of The Forum Defendant Rule Is Jurisdictional.

As described in the Petition (pp. 10-16), six of the seven circuits to decide the question have held that the forum defendant rule is nonjurisdictional, and is thus waived if the adverse party fails to file a timely motion for remand under 28 U.S.C. § 1447(c). In addition, the Eleventh Circuit has stated (but not held) that the presence of an in-state defendant is a nonjurisdictional defect that must be raised within 30 days of removal. Only the Eighth Circuit has adopted the contrary position

that the presence of an in-state defendant divests the district court of subject matter jurisdiction.

Respondent's efforts to distinguish the decisions of other circuits are unpersuasive. To begin with, Respondent does not attempt to distinguish the Seventh Circuit's decision in *Hurley* v. *Motor Coach Industries, Inc.*, 222 F.3d 377 (7th Cir. 2000), acknowledging that it is perhaps "the seminal case in establishing the forum defendant rule as a procedural defect." Br. in Opp. at 12. Instead, Respondent distinguishes a decision of this Court upon which the Seventh Circuit relied, *Caterpillar, Inc.* v. *Lewis*, 519 U.S. 61 (1996) (holding lack of diversity at time of removal did not require dismissal where all claims concerning nondiverse defendant were settled before trial). Whether *Caterpillar* is properly distinguished from the instant case is irrelevant to the split in authority among the circuits over the question presented.

Next, Respondent tries to distinguish the First Circuit's decision in *Farm Construction Services, Inc.* v. *Fudge*, 831 F.2d 18 (1st Cir. 1987), on the ground that in *Farm Construction* the plaintiff did not object to removal, while here the district court raised the forum defendant rule on its own motion and the plaintiff verified that a forum-state defendant was served in the case. Br. in Opp. at 14. Rather than serving to distinguish the First Circuit, the difference between *Farm Construction* and this case illustrates the circuit split at issue: If the Eighth Circuit is correct that a violation of the forum defendant rule divests the district court of jurisdiction, then the district court was right to raise the issue on its own motion, and plaintiff's verification that there was an in-state defendant was a sufficient basis upon which to remand this case. Moreover, if the Eighth Circuit is correct, *Farm Construction* was wrongly decided, because failure to object to removal cannot cure a jurisdictional defect. *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 18

(1951) ("It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case.").

If, on the other hand, the presence of an in-state defendant is a defect in the removal process "other than lack of subject matter jurisdiction," it must be raised by a motion to remand "within 30 days after the filing of a notice of removal." 28 U.S.C. § 1447(c). Here, as in *Farm Construction*, the plaintiff (Respondent) did not object to removal within 30 days. If the forum defendant rule is nonjurisdictional, *Farm Construction* was correctly decided and this case was not.

Respondent's only basis for distinguishing the Second Circuit's decisions holding that the forum defendant rule is nonjurisdictional appears to be that one of the cases involved a mortgage foreclosure. Br. in Opp. at 14. But the Second Circuit recently reaffirmed (in a wrongful death case) that "section 1441(b)'s rule against removal where a defendant is a citizen of the forum was a procedural rule and was not jurisdictional." *Shapiro* v. *Logistec USA Inc.*, 412 F.3d 307, 313 (2d Cir. 2005). In so holding, the Second Circuit expressly noted its disagreement with the Eighth Circuit's holding in *Hurt* v. *Dow Chemical Co.*, 963 F.2d 1142 (8th Cir. 1992). *Shapiro*, 412 F.3d at 313 n.2.

Nor is the Third Circuit's decision in *Korea Exchange Bank* v. *Trackwise Sales Corp.*, 66 F.3d 46, 50 (3d Cir. 1993), distinguishable. Respondent notes that in *Korea Exchange* the forum-state defendant removed the case. Section 1441 of title 28 does not distinguish between the forum-state defendant and other defendants. *See* 28 U.S.C. § 1441(b). Thus, the answer to the question whether the forum defendant rule is jurisdictional cannot turn on whether the removing defendant is the forum-state defendant or another defendant.

Respondent's attempt to distinguish the Fifth Circuit's cases is similarly unavailing. In *In re Shell Oil Co.*, that court expressly stated that the presence of a forum-state defendant is "a waivable removal defect" rather than a requirement of federal jurisdiction. 932 F.2d 1518, 1523 (5th Cir. 1991). The Fifth Circuit has continued to follow *Shell*. *E.g.*, *Marathon Oil Co.* v. *Ruhrgas*, 145 F.3d 211, 221 (5th Cir. 1998) ("[R]emoval by an in-state defendant in diversity cases . . . is waivable if not timely asserted by the plaintiff.").[1]

Respondent does not deny that the Sixth Circuit has held that a plaintiff's failure to timely challenge removal because of the presence of a forum-state defendant indicated consent to the federal forum. Br. in Opp. at 11, citing *Handley-Mack Co.* v. *Godchaux Sugar Co.*, 2 F.2d 435, 436 (6th Cir. 1924). Respondent notes that the plaintiff in *Handley-Mack* did not contest the removal until after a judgment was issued, but that is not a sufficient basis to distinguish the case. Under the current statute, however, "[a] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal." 28 U.S.C. § 1447(c). A plaintiff thus waives his objection to removal by failing to move to remand within 30 days; whether he objects on the

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[1] *Bregman* v. *Alderman*, identified by Respondent as a Fifth Circuit case. Br. in Opp. at 16, is actually an Eleventh Circuit case, and moreover is consistent with *Shell*. 955 F.2d 660 (11th Cir. 1992). In *Bregman*, the court confirmed that "removal "pursuant to § 1441(b)" where "two of the defendants were citizens of the forum state" is "a defect in removal procedure," and that "district court still had subject matter jurisdiction because there was complete diversity between the parties." *Id.* at 663-64.

31st day or after judgment is immaterial for purposes of section 1447.[2]

Finally, as noted in the Petition (p. 16), the Eleventh Circuit has not directly decided whether a violation of the forum defendant rule is jurisdictional, but has indicated its view that "removal in violation of 1441(b) is subject to the 30-day time limit" of section 1447(c). *Snapper* v. *Redan*, 171 F.3d 1249, 1258 (11th Cir. 1999). The 30-day time limit applies only to "a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction." 28 U.S.C. § 1447(c).[3]

The circuits are thus intractably split, seven circuits to one, on the question of whether the absence of

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[2] Respondent characterizes the Sixth Circuit as "by no means decided" on the question presented, but cites only a single unpublished decision for support. Br. in Opp. at 11, citing *Dellinger* v. *Atlas Techs., Inc.*, No. 92-2091, 1993 U.S. App. LEXIS 23813 (6th Cir. 1993) (unpublished). In *Dellinger*, however, the plaintiff "timely objected to removal." 1993 U.S. App. LEXIS at *3. *See also* Sixth Cir. R. 28(g) (citation to unpublished opinions is "disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.").

[3] Respondent contends that the Ninth Circuit holds that the forum defendant rule is jurisdictional, citing *Local Union 598* v. *J.A. Jones Constr. Co.*, 846 F.2d 1213, 1215 (9th Cir. 1988). *Local Union* does not clearly fall on either side of the circuit split. In that case, one defendant was both a citizen of the forum state and not diverse from the plaintiff. *Id.* The plaintiff voluntarily dismissed the nondiverse defendant and did not object to jurisdiction before judgment. *Id.* The court concluded that the judgment "may be upheld even if there was no right to removal" in such a circumstance. *Id.* at 1215-16, quoting *Grubbs* v. *General Elec. Credit Corp.*, 405 U.S. 699 (1972). Of course, even if Respondent were correct that the Ninth Circuit holds the forum defendant rule to be jurisdictional, it would only widen the circuit split.

a forum defendant is a requirement of federal jurisdiction in a removed case or a "defect other than lack of subject matter jurisdiction" which must be raised by motion within 30 days of removal or be waived. *Id.* Respondent acknowledges that there are "varying interpretations between the circuits," and has not articulated any colorable argument that the split is any less deep or entrenched than described in the Petition. Br. in Opp. at 16. The split has also been noted and considered by numerous courts and commentators, so further consideration is unlikely to shed additional light on the issue. *See* Pet. at 9 (collecting authorities). The Eighth Circuit has declined to consider its precedent *en banc*. Pet. App. 8a. Instead, the court left intact the panel decision declaring that its contrarian precedent "sets forth the better rule." Pet. App. 4a. The circuits are therefore likely to remain split over the scope of federal jurisdiction unless this Court resolves the issue.

II. This Case Provides An Appropriate Vehicle For Resolving The Split.

This case provides an appropriate vehicle for the Court to determine whether the forum defendant rule is jurisdictional. Petitioner timely removed the case from state court on the basis of federal diversity jurisdiction. The district court raised the presence of a forum defendant on its own motion, and remanded the case on its own motion after determining that a forum defendant was served. Pet. App. 10a; Br. in Opp. App. 1a-2a. Respondent declined to move to remand the case, instead filing an answer asking the court to "proceed to adjudication" on the merits of the case. Pl.'s Reply & Answer at 3.[1] The sole basis for remand was therefore

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[1] Respondent asserts that any reliance on this statement would be "specious," Br. in Opp. at 25, but does not explain why this (...continued)

the district court's adherence to Eighth Circuit precedent holding the forum defendant rule to be jurisdictional.

Respondent argues that because the district court believed that the presence of a forum defendant divested it of jurisdiction, the remand order is one that is "based on lack of subject matter jurisdiction," and therefore unreviewable under 28 U.S.C. § 1447(d). But this Court recently rejected the proposition that it may not look beyond the label given to a remand order by the district court. *See Kircher* v. *Putnam Foods Trust*, 547 U.S. ___, slip op. at 7 n.9 (2006). The courts of appeals have likewise held that in determining whether a remand order is based on grounds specified in § 1447(c), a reviewing court must look to "what the district court did—not what it said." *Shapiro* v. *Logistec USA Inc.*, 412 F.3d 307, 311 (2d Cir. 2005). The court "may therefore conclude that the basis for the remand was not a section 1447(c) ground even though the district court made statements that seem to suggest otherwise." *Id.*; *see also, e.g., United Investors Life Ins. Co.* v. *Waddell & Reed, Inc.*, 360 F.3d 960, 964 (9th Cir. 2004) ("[W]e examine the full record before the district court to ascertain the court's 'actual reason' for remanding."); *Russell Corp.* v. *Am. Home Assur. Co.*, 264 F.3d 1040, 1046 n.3 (11th Cir. 2001) ("In determining the basis for a remand order, we examine not only the district court's stated reasons, but also the substance of the order.").

Here, the district court's order unquestionably was based on the presence of a defendant in the forum state. The Eighth Circuit views this as a jurisdictional defect, while the rest of the circuits that have decided this question have found that it is not jurisdictional. A

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is so. Parties generally are held to statements in their pleadings.

district court cannot usurp this Court's role in policing the uniformity of federal law simply by using "magic words," *i.e.*, "lack of jurisdiction."

Moreover, there is complete diversity in this case. It is undisputed that Respondent is a citizen of Maine,[5] and that no defendant is a citizen of Maine. For the first time in this case, Respondent contends that he should be treated as the trustee of the disputed trust in the underlying dispute and therefore as a citizen of Missouri, the state where the trustors were residents.

This argument fails for the simple reason that, as this Court has held, "a trustee is a real party to the controversy for purposes of diversity jurisdiction when he possesses certain customary powers to hold, manage, and dispose of assets for the benefit of others." *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 (1980). Missouri trustees have all of these powers. Mo. Rev. Stat. Ann. § 456.8-815. "The general rule is that the citizenship of the real party in interest is determinative in deciding whether diversity jurisdiction exists." 6A Wright & Miller, Federal Practice & Procedure 2d § 1556 (1990 & Supp. 2005). Thus, even if Respondent is considered the trustee of the disputed trust at issue in this case, his own citizenship is determinative for purposes of diversity jurisdiction. *Accord, e.g.*, *Johnson* v. *Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006) ("A trust has the citizenship of its trustee or trustees."); *Lenon* v. *St. Paul Mercury Ins. Co.*, 136 F.3d 1365, 1371 (10th Cir. 1998) (holding that "the district court correctly looked to the citizenship of the trustees for diversity purposes"); *Guaranty Nat'l Title Co.* v. *J.E.G. Assocs.*, 101 F.3d 57, 59

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[5] The first sentence of the complaint filed by Respondent in the state court alleges, "Plaintiff is a resident of Brunswick, Maine." Pet. to Construe Trust at 1; *see also* Pet. App. 2a.

(7th Cir. 1996) ("For purposes of § 1332, the citizenship of a trust is the citizenship of its trustee.").[6]

Finally, Respondent's arguments that the Eighth Circuit's ruling is independently justified under the "rule of unanimity" and that there was no need to file a motion to remand must fail. Br. in Opp. at 23-25. As noted in the Petition, the circuits agree that failure of all defendants to join a notice of removal is a procedural defect in the removal process. *See* Pet. at 18-19. Procedural defects must be raised by a motion to remand within 30 days or else be waived; a court may not remand on a procedural ground *sua sponte*. 28 U.S.C. § 1447(c); *see also* Pet. at 19-20 (collecting cases). Respondent admits that he did not file a motion to remand on any ground. Br. in Opp. at 5. Consequently, Respondent waived an objection based on the rule of unanimity by failing to move for remand. Moreover, if the forum defendant rule is nonjurisdictional, Respondent was required to raise that issue by a motion to remand to avoid waiving it.[7]

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[6] Whether Respondent is the proper trustee in this case has not been determined. Respondent filed this case in order to construe the underlying trust; the identity of the trustee depends on the outcome of the case on the merits.

[7] Petitioner's counsel regrets that counsel for Respondent did not receive service copies of the Petition. *See* Br. in Opp. at 4 n.1. As best as Petitioner's counsel can determine, service copies were sent to Respondent's counsel on May 9, 2006, via first-class mail, at the address shown on the certificate of service.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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